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Collective Actions in the UK and EU One Year On – Has the Dam Burst Yet?


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Introduction

Many are wondering whether we are beginning to see the UK and EU collective actions regime significantly open up. It is interesting to pause and reflect on that regime and some recent changes within it – what can be seen are signs of increased activity and development in important areas that drive transformation in the market. In this chapter, we consider some recent cases of interest, the areas of key development from a procedural and market perspective, and new fields of collective action work. Against that background, we assess where the main spheres of future activity might well be.

The UK and EU collective actions system has historically been perceived to be constrained by its own dynamics, including the opt-in system and "loser pays" costs regime. Avenues exist for pursuing claims, but practitioners have had to be flexible and inventive in pursuing group claims in an economically viable way. Funding for actions has often not been available, particularly when contemplating actions against well-funded defendants, leading to the possibility of large adverse costs orders. The operation of the opt-in system has also meant that those contemplating action will be aware that settlement within limitations periods might be unattractive for defendants seeking finality while faced with potential claims from those not part of the claimant group. There has also been a relatively low level of experience at practitioner level of successful pursuit of collective actions, particularly compared to the US.

As can be seen from the analysis below, there have been important changes in a number of these areas which are having a clear effect on the market.

Developments in the UK and International Litigation Funding Market During 2020/21

In last year's edition of this chapter, we discussed the growth of the litigation funding market in and outside the UK, and the effect of this in the context of group litigation and the wider litigation market generally. Notwithstanding the current pandemic (or perhaps even as a result of it, as is discussed in more detail below), the growth of the litigation funding sector has continued at pace throughout the last year and further developments in the litigation funding market have taken place. In this section we examine the growth of the market by looking at the numbers involved, the extent to which the COVID-19 pandemic has affected the litigation funding market, and the type of cases where future growth is expected.

Globally, litigation funding has been progressing at varying speeds across different jurisdictions. Outside of the United States, the UK has one of the more mature litigation funding markets: a recent study estimated that there were approximately GBP 2 billion worth (approximately USD 2.7 billion) of third-party-funded claims in England & Wales. In three years alone, the funding market has doubled in size and most practitioners and market participants expect further significant growth in years to come. In larger commercial claims (particularly group actions and large actions being pursued in the name of an individual as opposed to a corporate or large organisation), the use of third-party funding is now a relatively common feature within the London commercial litigation market.

The question that comes to mind is: will the litigation funding market in the UK continue to grow, and, if so, at what speed? New market participants have continued to enter the market in recent years, in the form of private capital from, for example, family offices, and hedge funds seeking to diversify the asset classes in which they invest. The large market participants who specialise in litigation funding remain and will continue to invest in the same types of claims, but these newer participants are increasingly seeking to fund more "difficult" or unusual claims. This will inevitably lead to an increase in the overall funded marketplace, as many of those claims may not otherwise have been pursued.

It also serves to note that some of the more established funders are apparently taking more risk in terms of the types of claims that they fund. Burford Capital, the largest standalone litigation funder with a significant presence in the London market, has received a lot of press coverage in recent months in relation to its (successful) investment in proceedings to enforce a financial award made in a high-profile divorce case. For Burford, who typically invest in large commercial claims, this was reported as something of a departure from the typical profile of their funded claims. It remains to be seen whether this is an isolated example, or evidence of the established funders themselves trying to take on the newer market participants in less traditional types of funded claims.

The increase in the funded market during the last few years is not solely attributable to the attractiveness of litigation claims as an asset class in and of itself. It has been reported that the cost of capital for litigation funding has become less expensive for funders through their use of debt structures, corporate bonds and insurance protection, all of which gives the funders an effective increase in the capital that they can deploy to invest in new claims. Clearly, some growth will come from the use of these financing structures, although there will be a natural ceiling to the additional capital that these structures will release for funders.

For a number of years following the financial crisis, global interest rates remained low, and it was increasingly difficult to achieve an acceptable return on capital. Commentators have noted that capital therefore found a home in increasingly "risky" asset classes (of which litigation claims form a part, given the unpredictable nature of litigation). Before the COVID-19 pandemic, rising central bank interest rates in both the US and UK implied that there was (at least on some level) a return to "normality", with interest rates (slowly) returning to the levels seen before the financial crisis. The COVID-19 pandemic put an end to that, and the UK saw abrupt reductions in the Bank of England interest rate to levels last seen in the aftermath of the financial crisis.

The pandemic has also meant business interruption and turmoil in the financial markets, both of which are often the precursors to litigation. Despite many companies believing that they have legitimate claims arising out of or in relation to the pandemic, some continue to suffer from a lack of capital to deploy on their ordinary activities, let alone to use as a means to fund litigation.

This combination of factors suggests that there is a continued place and appetite for third-party litigation funding in the UK (and internationally) that suggests that growth in the market will continue. It remains to be seen whether the industry can sustain the impressive levels of growth seen in the past few years, or whether the market will reach a state of maturity and begin to see muted growth in the medium term. Certainly, there can only ever be a finite number of investable claims available to funders at a given moment, and the entry of new market participants will do much to sweep up those claims that may not have been attractive to the bigger players. We may even see consolidation within the marketplace as smaller funders find it difficult to build a sustainable book of investable claims, while operating in an overcapitalised market facing downward pressure on margins and returns.

Having said that, it seems to us that the funding market will continue to grow, and while it might not achieve the stellar growth rates of the past three years, there is plenty of evidence to suggest that robust growth will continue for the foreseeable future. The post-financial-crisis search for return on capital means that the appetite for peripheral asset classes such as litigation claims will continue for some time yet. The pandemic has also created a wave of potential litigation as corporates and individuals alike sit on claims that, whilst viable and valuable, are difficult to take forward in the current economic climate when it is difficult to justify the use of spare capital to pursue litigation. In these circumstances there is quite clearly an opportunity for litigation funders to step in to provide capital and liquidity for such claims.

In the UK, and particularly the London market, there are tentative signs that this is already happening. The legal press has reported that corporates appear to be approaching funders from the outset when considering potential litigation as their need to manage liquidity and balance sheets becomes key. This represents a cultural shift, given that corporates previously would not typically have considered litigation funding and, if they did, it was likely to be at a later stage of proceedings. It may be that this becomes a permanent change within the London market as third-party funding becomes more common, high-profile and available on attractive terms.

Some commentators have expressed the view that the funding market may already be at saturation point given the finite availability of investable claims. This seems to be a pessimistic view of the situation and largely ignores the possible future growth from new users of litigation funding (e.g. corporates) and the potential for pandemic-related issues to drive growth in new claims.

Group litigation has typically attracted the attention of funders and there is often now an assumption by the defendant that a litigation funder will be standing behind such claims. Funders will continue to invest in these types of cases, but one area in which we foresee further growth in the UK is group shareholder actions (which in the UK are brought pursuant to section 90A of the Financial Services and Markets Act 2000). Group shareholder actions/securities litigation have been a feature of US litigation markets for many years, and the US remains the most mature and sophisticated market for such claims.

Despite the UK statutory regime having been in force for a number of years, such proceedings remain comparatively rare in the UK despite the sophistication of the UK's financial services and legal markets. Funders have also seen an increase in group competition claims in recent years which show no signs of abating. It seems to us that group shareholder and competition actions are likely to see significant growth in the years to come, and will continue to attract the interest of litigation funders.

The impact for litigation and arbitration practitioners is that these developments in the market are leading to more and better-presented claims being pursued. Better funding and increased due diligence in funded claims are leading to them having greater chances of success than might previously have been the case. The developments in the market are driving change and should be watched by claimant/plaintiff- and defence-side counsel alike.

UK/EU Developments in Class Actions

We discussed in last year's chapter the various ways to bring a collective action in England & Wales. To summarise those briefly, they are:

- In the High Court:
  - Claims which can be "conveniently" disposed of in the same proceedings can either be brought jointly or consolidated, with the court exercising overall case management using its ordinary procedural rules.
  - Group Litigation Orders ("**GLOs**") provide for several claims, where more than one claimant has a cause of action raising common or related issues of fact or law, to be grouped together and managed using specific procedural rules.
  - Representative actions (where the representative can bind the underlying claimants represented who form part of the relevant group).
- In the Competition Appeal Tribunal ("**CAT**"):
  - Collective actions which can be brought by multiple claimants or by a specified body on behalf of consumers.
  - Collective actions which can be the subject of a collective proceedings order, and can proceed on either an opt-in or opt-out basis.

Recent developments in attitudes of courts to class actions in England & Wales

Due to the variety of available options for pursuing group litigation, choosing the most suitable regime can be difficult for practitioners, not least because of potential costs consequences. The formal collective action regimes do not apply automatically (although a court can sometimes certify a group action of its own volition), and claimants are usually required to make an application and justify why they should be subject to a particular regime. Defendants are entitled to oppose such applications (for strategic reasons, if nothing else).

Most of the collective action regimes in England & Wales utilise an "opt-in" system, in which litigants must actively opt into being represented, rather than an "opt-out" system, in which litigants are automatically included in litigation unless they express their desire not to participate. However, the closest available regime to an "opt-out" class action regime in England & Wales is found in the competition sphere. In fact, in response to a December 2020 Supreme Court judgment,[1] the first opt-out collective action has been certified by the UK CAT in the case of *Merricks v Mastercard*,[2] in which a collective damages action was filed against Mastercard by Walter Merricks on behalf of UK consumers.[3] The Supreme Court judgment offers detailed guidance on the approach to class certification by the CAT, and has opened the door to future similar claims.

Because of the limited application of the collective action regime in the competition sphere, however, most group actions in England & Wales proceed in the High Court using one of the regimes described above. In the High Court, there has been judicial recognition of the realities of group litigation and some willingness to engage in appropriate case management even where no formal application for either a GLO or a representative action has been made.

In a shareholder group action against RSA Plc[4] under section 90A Financial Services and Markets Act ("**FSMA**"), the court held a case management hearing in which it ordered that the claimants (who were individual claimants each bringing independent claims absent a GLO or representative order) undertake a sampling exercise to show the extent to which they relied on published information, including agreeing suitable categories of reliance into which each claimant would fit. This measure reduced the need for each individual claimant to separately prove its case on reliance, thereby decreasing time and costs and preventing the creation of a significant amount of duplicative information.

This was a helpful recognition by the court that case management of group litigation should proceed in a reasonable and proportionate manner and that there can be just disposal of the issues on what is effectively a representative basis, without the need to utilise either of the formal group litigation mechanisms available in the High Court.

However, not every judge takes the same pragmatic view. In the consequentials hearing following the defendant's successful strike-out of several of the claimants' claims in another recent section 90A action,[5] the claimants argued for the common costs of the action[6] to be reserved until trial. That argument was made based on the Court of Appeals' decision in *Sayers & Ors v Merck, Smithkline Beecham Plc & Ors* [2001] EWCA Civ 2017, where, in a group litigation subject to a GLO, common costs were reserved until trial. Despite the claimants' submissions that they should not have to bear the defendant's costs at this juncture given the prospect of a finding in the claimants' favour on the common issues at trial, the judge declined to apply *Sayers*.

EU Directive on representative actions

Currently, the various EU Member States have significantly differing group action regimes; indeed, some jurisdictions, such as Ireland, have no formal mechanisms to bring group/class actions whatsoever. For some time, the EU has been consulting on a suitable group action regime that provides effective redress for consumers, while mitigating the perceived negative aspects of US-style class actions.

On 4 December 2020 the EU published EU Directive 2020/1828 on representative actions for the protection of the collective interests of consumers (the "**Directive**").[7] Member States are required to adopt implementing measures by 25 December 2022 and the measures will apply from 25 June 2023.

The focus within the EU regime is on consumer redress, with a view to actions being brought by a consumer organisation on behalf of a specified class of consumer. This is one way in which the EU is seeking to adopt the advantages of the US-style class action regime, whilst ameliorating some of the perceived disadvantages. The Directive requires each Member State to designate at least one "qualified entity" that will be empowered to bring collective action claims on behalf of consumers for breaches of a wide range of EU legislation. Member States will have substantial discretion in selecting the criteria that qualified entities must meet for the purpose of bringing domestic representative actions. If the qualified entity intends to bring a cross-border action, however, there are prescribed, more stringent criteria that the qualified entity must meet.

Under the Directive, any alleged infringing conduct must be related to claims arising under any of the 66 European directives and regulations specified in Annex I to the Directive, along with their national implementing measures. These include, amongst others, the General Product Safety Directive and the General Data Protection Regulation. The Directive also clearly states that consumers remain entitled to other protections found in EU law.

To redress any infringing conduct, qualified entities will be able to apply for preventative or prohibitive injunctive relief. In addition, qualified entities may seek redress on behalf of consumers in the form of compensation, repair, replacement, price reduction, contract termination or reimbursement. The Directive states that the awarding of punitive damages should be avoided (in a nod to the perceived disadvantages of the US system).

The Directive sets out a number of minimum standards and safeguards that Member States will have to implement, but offers wide discretion to Member States on how precisely to enact them into national law. For instance, Member States can determine for themselves, amongst other things: (1) the "required degree of similarity of individual claims"; (2) the minimum number of consumers required in order for a case to be heard as a representative action; (3) whether Member States will allow representative actions to be brought in judicial proceedings, administrative proceedings, or both; (4) what rights to offer individual consumers within a representative action; and (5) whether to offer an opt-in system, an opt-out system, or both.[8]

The Directive allows for representative actions to be funded by third parties, but requires qualified entities to be "fully transparent" regarding the sources of their funding. The Directive also establishes the "loser pays" principle, pursuant to which the unsuccessful party is liable for the successful party's costs. Individual claimants, however, will not usually be liable for adverse costs.

The Directive will improve access to justice for consumers in a variety of areas, such as data protection, by making mass claims for injunctions or damages easier to bring. The Directive also contains a variety of safeguards to prevent frivolous or vexatious litigation, including: the requirement that actions be brought by qualified entities; the "loser pays" requirement; and the ability of courts to dismiss "manifestly unfounded cases".

Criticism of the Directive includes that the discretion afforded to Member States in creating a representative action regime will lead to fragmented rules. Further, some have suggested that the drafting of the Directive will encourage forum-shopping, because: (1) a qualified entity may have several choices of jurisdiction in which to bring an action and will likely seek out the one with the most favourable legislative framework; and (2) third-party funding is not presently available in some EU jurisdictions (e.g. Ireland).

Although, in light of Brexit, the EU regime will not apply to the UK, there are strong similarities between the EU regime and the extant opt-out class action regime available in the UK CAT. It remains to be seen whether, as a result of ongoing government consultations, the UK will implement any of the features of the Directive that are not currently present in its own group action regimes.

Competition Litigation Update

Since the introduction in the UK of the new collective actions regime for competition damages claims in 2015, proposed collective proceedings have been brought in seven instances. The claims concern mobility scooters, interchange fees, rail fares, trucks, and foreign exchange fees. However, until the Supreme Court's judgment on 11 December 2020 in *Merricks v Mastercard*,[9] none of the proposed collective proceedings had progressed beyond the certification stage.

The Supreme Court's ruling in *Merricks* prioritised access to justice for claimants, thereby enabling the class representative, Mr. Merricks, to proceed with his claim on behalf of approximately 46.2 million UK residents for alleged losses relating to interchange fees incurred over a 16-year period across all retail sectors in the UK economy, with damages estimated at around GBP 14 billion.

With many certification cases having awaited the outcome of the proceedings in *Merricks*, it is likely that the Supreme Court's permissive approach to certification constitutes a significant landmark in collective actions in the UK.

Background

The *Merricks* action arises as a follow-on claim further to the European Commission's 2007 infringement decision against Mastercard, in which the Commission found that Mastercard's European Economic Area ("**EEA**") multilateral interchange fees ("**MIFs**"), governing fee payments between banks relating to transactions made using payment cards, breached article 101 of the Treaty on the Functioning of the European Union ("**TFEU**").[10] The decision was upheld by the General Court ("**GC**") on 24 May 2012[11] and the Court of Justice of the European Union ("**CJEU**", and together with the GC, the "**European Court**") on 11 September 2014.[12]

This gave rise to a number of follow-on and stand-alone damages claims in the UK by a retailers, including Sainsbury's, against Mastercard and, separately, Visa in respect of their UK (and, in some instances, EEA) MIFs. In addition to the UK damages actions by retailers, in September 2016, a collective damages action was filed with the CAT against Mastercard on behalf of UK consumers by Walter Merricks, the former Chief Ombudsman of the Financial Ombudsman Service, under the opt-out regime in section 47B of the Competition Act in *Walter Hugh Merricks CBE v Mastercard Inc and Others*. Merricks sought damages on behalf of UK consumers, alleging that the merchants paying the Mastercard MIFs inflated their retail prices in order to pass on all or part of the cost of the MIF to consumers.

Under the Competition Act, once commenced, collective proceedings may be continued only if the CAT makes a Collective Proceedings Order ("**CPO**"); that is, grants certification.[13] However, as described above, in July 2017, the CAT refused to grant Merricks a CPO[14] for two reasons:

(1) The CAT was unpersuaded that there was sufficient data available over the entirety of the historical infringement period for Merricks' proposed methodology for quantifying aggregate damages to be applied on a sufficiently sound basis.[15] It accordingly held that the claims were not suitable for an aggregate award of damages and, therefore, not suitable to be brought in collective proceedings. Such a suitability finding is a necessary precondition for the grant of a CPO under the Competition Act.[16]

(2) The CAT found that, even if an approximation of the loss could be calculated at the aggregate level, there was no way of then reaching even a rough approximation of the loss suffered by each individual claimant in the class, thereby infringing the tort-law principle that damages had to be compensatory for losses suffered.[17]

On 16 April 2019, the Court of Appeal upheld an appeal against the CAT's judgment, finding that the CAT had erred in refusing to grant a CPO.[18] On 24 July 2019, Mastercard was granted permission to appeal the judgment to the Supreme Court.

The Supreme Court judgment

The Supreme Court handed down its judgment in December 2020, dismissing Mastercard's appeal in a three-to-two ruling.[19] Both the majority and the minority were in agreement that the CAT had erred in its second reason for refusing to grant certification, on the basis that the proposed method for distribution did not reflect individual losses, since the Competition Act, in providing for aggregate awards of damages without assessing individual class members' losses, had changed the operation of the compensatory principle.[20] The only requirement is that the distribution is just, in the sense of being fair and reasonable.[21]

The key point of disagreement between the majority and the minority was on whether the claim was "suitable" to be brought in collective proceedings. Lord Briggs, for the majority, held that collective proceedings vindicate claimants' rights when individual claim procedures are inadequate for the purpose as individual claims would be impracticable or disproportionate.[22] However, given that the claims which are enabled to be pursued collectively could all, at least in theory, be individually pursued by ordinary claim, "*it should not lightly be assumed that the collective process imposes restrictions upon claimants as a class which the law and rules of procedure for individual claims would not impose*".[23]

Lord Briggs went on to refer to cases on compensation for pain and suffering in personal injury claims and for loss of a chance, to find that, in ordinary civil proceedings where the claimant has established a triable issue, the court does not deprive the claimant of a trial merely because of forensic difficulties in quantifying damages.[24] The court accordingly held that there is nothing in the statutory scheme for collective proceedings to suggest that the principle of justice that claimants who have suffered more than nominal loss by reason of the defendants' breach should have their damages quantified by the court doing the best it can on the available evidence, is in any way watered down in collective proceedings.[25]

Holding that the evident purpose of the statutory scheme was to facilitate rather than to impede the vindication of consumers' rights, the court found that the gatekeeping function of the CAT at the certification stage should not be a mechanism to prevent a case from proceeding to trial because of difficulties in the quantification of damages.[26] Accordingly, Lord Briggs held that whether or not claims are "*suitable*" to be brought in collective proceedings is a *relative* judgment, meaning that it has simply to be determined if the claims are more appropriately brought as collective proceedings rather than as individual proceedings.[27]

Where the majority focused on ensuring access to justice, Lord Sales' and Lord Leggatt's dissent focused on a floodgates argument, namely the risk that collective proceedings would be abused by claimants in cases where there is no realistic prospect of recovery of damages, but where the size of the claims and the heavy costs of defending the action may be used as a threat to induce defendants to settle.[28] The minority therefore placed great emphasis on the gatekeeping role of the certification process. They argued that there was no basis in the legislation for finding that "suitable" is a relative test, and that it meant, in the abstract, "*suitable to be grouped together and determined collectively*" under the Competition Act. That requires a consideration of whether collective proceedings offer a reasonable prospect of achieving a just outcome, and whether collective proceedings are likely to achieve a fair determination at proportionate cost.[29]

Implications

The judgment has set a low threshold to be applied in determining whether antitrust class actions should be certified and proceed to a full trial. As Lord Briggs noted, the pursuit of a multitude of individually assessed claims for damages, which is all that is possible in individual claims under the ordinary civil procedure, is both burdensome for the court and usually disproportionate for the parties, while collective proceedings "*radically dissolves those disadvantages, both for the court and for all the parties*".[30]

However, that does not mean that the test for certification has been emptied of meaning or purpose. That the certification stage will continue to constitute a bar to certain claims was illustrated when the claim returned to the CAT for reconsideration. While the CAT, in a judgment of 18 August 2021 (applying the principles and guidance set down by the Supreme Court judgment), made a CPO,[31] it rejected an application to include a claim for compound interest. The CAT ruled that, in the absence of a credible or plausible method of estimating what loss by way of compound interest was suffered on an aggregate basis, the new proposed claim for compound interest "*was not suitable for an aggregate award*".[32] It follows from the CAT's judgment that even a relative test for suitability will not always be satisfied, and that a relatively high merits threshold may continue to be applied at certification hearings.

Conclusion

The divided Supreme Court judgment laid bare the fundamental tension at play at the certification stage, between enabling access to justice and restricting unmeritorious claims from flooding courts and defendants. This tension was already acknowledged by the UK Government when it introduced the legislation. In responding to feedback on its consultation on collective actions in 2013, the Government observed:

> "Breaches of competition law, such as price-fixing, often involve very large numbers of people each losing a small amount, meaning it is not cost-effective for any individual to bring a case to court. Allowing actions to be brought collectively would overcome this problem, allowing consumers and businesses to get back the money that is rightfully theirs – as well as acting as a further deterrent to anyone thinking of breaking the law."

Recognising the concerns raised that this could lead to frivolous or unmeritorious litigation, the Government is introducing a set of strong safeguards, including:

- Strict judicial certification of cases so that only meritorious cases are taken forward.
- No treble damages.
- No contingency fees for lawyers.
- Maintaining the 'loser-pays' rule so that those who bring unsuccessful cases pay the full price.[33]

While the Supreme Court's judgment may have de-emphasised (but not eliminated) the gatekeeping function of the certification stage, the CAT remains well equipped to ensure unmeritorious cases do not progress. It can fulfil a gatekeeping role through application of not just its power to refuse certification, but also its broader arsenal of powers, including the power to, of its own initiative, strike out all or part of a claim,[34] give default judgment,[35] give summary judgment,[36] and "*make any directions it thinks appropriate for the case management of the collective proceedings*".[37] It is accordingly expected that the above central tension will continue to play out in future claims for collective proceedings.

Increasing Use of Arbitration in US Disputes

An emerging issue in class and mass actions in the United States, that merits consideration for what it means in the UK and EU, is the increase in a "mass arbitration" strategy being employed by the plaintiffs' bar. While still in its infancy, this strategy has already shown the potential to pay big dividends for the plaintiffs' bar and cause heartache for corporate defendants.

In a nutshell, the strategy is this: where companies have used arbitration provisions with class action waivers to preclude the prosecution of class or collective actions, a creative and well-funded plaintiffs' bar has harnessed technology and the plaintiff-friendly terms of the court-blessed arbitration provisions to initiate hundreds or even thousands of individual arbitrations. Where a class action waiver requires the company to pay up front the costs of the arbitration, the company may have to pay millions of dollars of fees just to start the arbitration process, and then faces significant defence costs and potential liability for defending the claims.

This issue originated with companies employing arbitration clauses with class action waivers to preclude mass and collective action exposure. This strategy was blessed by the US Supreme Court in a series of cases, beginning with *AT&T Mobility LLC v Concepcion*,[38] with the Supreme Court holding that, where a class action waiver has terms that do not make individual arbitration prohibitively expensive, the class action waiver is enforceable under the Federal Arbitration Act,[39] and plaintiffs must bring their claims (if at all) individually in arbitration.

In the wake of *Concepcion*, many companies inserted arbitration clauses with class action waivers in employment and consumer-facing contracts, with terms that mimicked the terms that were approved by the US Supreme Court in *Concepcion*, including that: the company pays the entire cost of arbitration, unless the claim is determined to be frivolous; the arbitrator is not limited in damages he/she can award; and if the award is greater than the company's last offer, it would be increased by USD 7,500 with an entitlement to double attorneys' fees.

The strategy behind the use of these provisions was that most class actions are lawyer driven, the plaintiffs' bar would not waste their time in individual arbitration cases without the potential for a large payday, and aggrieved consumers and employees still had a right to pursue their claims. This strategy worked well for many years, with courts enforcing arbitration provisions, and with relatively few arbitrations initiated.

However, beginning around 2018, a few firms – led by the Keller Lenkner Firm – initiated a new strategy: use social media to attract a large number of individual clients, and then use technology to prosecute the individual claims with high lawyer leverage. With fees that many companies agreed to take on costing more than USD 4,000 per case, companies faced the potential to have to write a large cheque up front just for case administration, and then had to contend with liability exposure and cost of defence.

Courts who previously granted motions by the company to force plaintiffs into individual arbitrations have been unsympathetic to pleas, by the same companies, that this mass arbitration strategy is unfair or impermissible. For example, when the food delivery service DoorDash asked the same judge who had compelled individual arbitration for relief from thousands of individual arbitration demands, the judge denied the request, writing:

> "For decades, the employer-side bar and their employer clients have forced arbitration clauses upon workers, thus taking away their right to go to court, and forced class-action waivers upon them too, thus taking away their ability to join collectively to vindicate common rights. The employer-side bar has succeeded in the United States Supreme Court to sustain such provisions. The irony, in this case, is that the workers wish to enforce the very provisions forced on them by seeking, even if by the thousands, individual arbitrations, the remnant of procedural rights left to them. The employer here, DoorDash, faced with having to actually honor its side of the bargain, now blanches at the cost of the filing fees it agreed to pay in the arbitration clause. No doubt, DoorDash never expected that so many would actually seek arbitration. Instead, in irony upon irony, DoorDash now wishes to resort to a class-wide lawsuit, the very device it denied to the workers, to avoid its duty to arbitrate. This hypocrisy will not be blessed, at least by this [court]."[40]

With no opportunity for relief from courts, the plaintiffs' bar has aggressively pushed this strategy, and defendants have limited options.

One is to settle, and many have done that; Keller Lenkner alone claims to have secured more than USD 375m in settlements for more than 100,000 individual arbitration clients over a two-year period.

Another option is to defend thousands of individual arbitrations. This creates a game of "chicken", with defendants assuming that plaintiffs do not have the financial motivation or inclination to actually prosecute the thousands of individual arbitrations they have initiated. Whether this costly strategy will bear fruit is still an open question. Meanwhile, arbitration providers like the American Arbitration Association and JAMS are faced with the task of finding enough arbitrators to handle this large volume of claims.

Other companies are revisiting the terms of the arbitration provisions to reduce the leverage that a plaintiff has when initiating an individual arbitration; for example, by removing the agreement where the company pays the cost of the arbitration. Of course, the company faces the possibility that, without these plaintiff-friendly provisions, courts will refuse to enforce them, leaving the company exposed to class and mass action risk.

Still others have made the decision to remove the class action waiver and defend class actions in federal court. Most notable among these is Amazon, who earlier this year removed the class action waiver from its consumer terms of use after facing more than 75,000 arbitration demands on claims that the company's voice-operated assistant, Alexa, was recording customers without their consent.[41]

Only time will tell which of these strategies will win out as more plaintiffs' firms push these new and potentially lucrative strategies.

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Endnotes

1. *Mastercard Incorporated and others (Appellants) v Walter Hugh Merricks CBE (Respondent)* [2020] UKSC 51 ("***Merricks (Supreme Court)***").
2. *Walter Hugh Merricks CBE v Mastercard Incorporated and Others* [2021] CAT 28, judgment of 18 August 2021 ("***Merricks (CAT 2021)***").
3. For a detailed overview of this case, please see our competition litigation update in this chapter.
4. *Allianz Global Investors GmbH & 76 Ors v RSA Insurance Group Plc* [2021] EWHC 570 (Ch) (unreported).
5. *Various Claimants v G4S Plc* [2021] EWHC 524 (Ch); consequentials judgment unreported.
6. Common costs of the action are costs incurred by the claimant group as a whole that cannot be attributed to individual claimants.
7. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2020.409.01.0001.01.ENG.
8. For cross-border actions, only the opt-in basis will be available.
9. *Merricks (Supreme Court).*
10. COMP/ 34579, Mastercard I, Commission decision of 19 December 2007.
11. Case T-111/08, *Mastercard and Others v Commission*, judgment of 24 May 2012.
12. Case C-382/12, *Mastercard and Others v Commission*, judgment of 11 September 2014.
13. Section 47B (4), Competition Act 1998.
14. *Walter Hugh Merricks CBE v Mastercard Inc and Others* [2017] CAT 16, judgment of 21 July 2017 ("***Merricks (CAT 2017)***").
15. *Merricks (CAT 2017)*, para. 78.
16. Section 47B (5) provides that the CAT may only make a CPO "*in respect of claims which are eligible for inclusion in collective proceedings*". Section 47B (6) clarifies that "[c]*laims are eligible for inclusion in collective proceedings only if the Tribunal considers that they raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings*". Rule 79(2) of the CAT's Rules, in turn, provides that "[i]*n determining whether the claims are suitable to be brought in collective proceedings* […] *the Tribunal shall take into account all matters it thinks fit, including* […] *whether the claims are suitable for an aggregate award of damages*".
17. *Merricks (CAT 2017)*, paras 88–89.
18. *Walter Hugh Merricks CBE v Mastercard Incorporated and Others* [2019] EWCA Civ 674, judgment of 16 April 2019.
19. Lord Kerr sadly passed away before the judgment was handed down, but had expressed his agreement with the judgment of Lord Briggs for the majority and would have been recorded as agreeing with it.
20. *Merricks (Supreme Court)* at paras 58, 76–77 and 93–94.
21. *Merricks (Supreme Court)* at para. 58.
22. *Merricks (Supreme Court)* at para. 45.
23. *Merricks (Supreme Court)* at para. 45.
24. *Merricks (Supreme Court)* at para. 47.
25. *Merricks (Supreme Court)* at para. 54.
26. *Merricks (Supreme Court)* at para. 54.
27. *Merricks (Supreme Court)* at paras 56–57.
28. *Merricks (Supreme Court)* at para. 86.
29. *Merricks (Supreme Court)* at para. 116.
30. *Merricks (Supreme Court)* at para. 57.
31. *Merricks (CAT 2021)*, paras 99–100.
32. *Merricks (CAT 2021)*, para. 97.
33. "Private actions in competition law: a consultation on options for reform – government response", publication of January 2013, p. 6, para. 2.
34. Rule 41 of the CAT's Rules.
35. Rule 42 of the CAT's Rules.
36. Rule 43 of the CAT's Rules.
37. Rule 88 of the CAT's Rules.
38. 563 U.S. 333 (2011).
39. 9 U.S.C. §2.
40. 438 F.Supp.3d 1062, 1058 (ND CA 2020).
41. https://www.nytimes.com/2021/07/22/business/amazon-arbitration-customer-disputes.html.

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